IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PRESIDING HONORABLE KURTIS T. WILDER, HONORABLE JOEL P. HOEKSTRA AND THE HONORABLE DONALD S. OWENS

ANN and LEE COBLENTZ
JOHN and DEBORAH LEWANDOWSKI,

Plaintiffs/Appellants,

v

Supreme Court No.: 127715
Court of Appeals No.: 255359
Lower Court No.: 03-046760-CZ

CITY OF NOVI,

Defendant/Appellee.
_____/

BRIEF ON APPEAL - APPELLANTS

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

RICHARD D. WILSON (P39344)
GARY A. ROSSI (P25392)
Law Offices of Bailey & Rossi, P.C.
Attorney for Plaintiffs/Appellants
42505 Woodward Ave., Ste. 200
Bloomfield Hills, MI 48304
(248) 858-2443

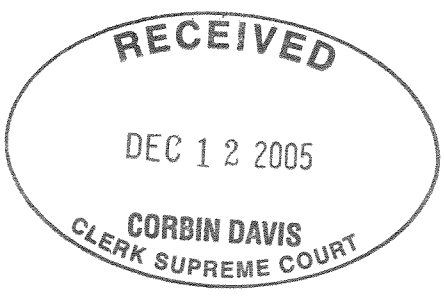

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

MICHIGAN COURT RULES

TREATISES

STATEMENT OF THE ORDERS APPEALED

Plaintiffs/Appellants appeal from the Oakland County Circuit Court Orders of August 19, 2003 **(Appendix 1a-4a)**, December 19, 2003 **(Appendix 5a-6a)**, January 27, 2004 **(Appendix 7a-9a)**, and April 21, 2004 **(Appendix 10a-11a)** entered by Judge Fred M. Mester, and the published opinion of the Court of Appeals, Coblentz, et al v City of Novi, 264 Mich App 450 (2005), **(Appendix 12a-17a)** decided November 23, 2004.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302(G)(1) and (3).

STATEMENT OF QUESTIONS INVOLVED

1. This Court should reverse the Court of Appeals' ruling that failed to require Defendant/Appellee to turn over the missing and intentionally deleted exhibits which were not exempt under any Freedom of Information Act exemption.

Plaintiffs/Appellants answer:	Yes
Defendant/Appellee answers:	No
Trial Court answers:	No
Court of Appeals answers:	No

2. This Court should reverse the Court of Appeals' decision that Defendant/Appellee did not have to provide documentation regarding Global Agreements and/or Readings and any Site Plans where Plaintiffs/Appellants were denied any discovery. This Court should uphold that discovery is allowable in Freedom of Information Act cases to insure compliance with Freedom of Information Act requests.

Plaintiffs/Appellants answer:	Yes
Defendant/Appellee answers:	No
Trial Court answers:	No
Court of Appeals answers:	No

3. The side "letters" withheld by Defendant/Appellee did not constitute the development of governmental policy pursuant to MCL 15.243(1)(f). This Court should overrule the Court of Appeals' redefinition of what constitutes a development of a governmental policy and a trade secret or financial information under the FOIA.

A. That resolution of the specific circumstances involving Plaintiffs/Appellants property does not constitute development of a governmental policy under the FOIA.

B. The particularized findings required to deny a FOIA request were not set forth to support exemption.

C. The FOIA requires that the promise of confidentiality must be given upon submission.

D. The FOIA requires that in order for documents to be exempt the promise of confidentiality must be authorized at the time the promise was made by a chief administrative officer, or an elected official.

E. This Court should rule that at a reasonable time for confidential documents to be recorded and maintained in a central place and be made available to any person on demand pursuant to MCL 15.243(1) is not five months and after an FOIA request.

Plaintiffs/Appellants answer:	Yes
Defendant/Appellee answers:	No
Trial Court answers:	No
Court of Appeals answers:	No

4. This Court should rule MCL 15.234 does not provide for an attorney fee to charged to a FOIA requester.

Plaintiffs/Appellants answer:	Yes
Defendant/Appellee answers:	No
Trial Court answers:	No
Court of Appeals answers:	No

5. This Court should rule an independent attorney is not an employee of a public body pursuant to MCL 15.234.

Plaintiffs/Appellants answer:	Yes
Defendant/Appellee answers:	No
Trial Court answers:	No
Court of Appeals answers:	No

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This is an action pursuant to MCL 15.231 et. seq, regarding documents requested pursuant to the Freedom of Information Act (FOIA). Plaintiffs/Appellants Lee and Ann Coblentz are legal title holders of the property known as 28095 Dixon Road, Novi, Michigan. Plaintiffs/Appellants John and Deborah Lewandowski are legal title holders of the property known as 28191 Dixon Road, Novi Michigan. The properties owned by the collective Plaintiffs/Appellants consist of more than two (2) acres.

On or about January 21, 1999, Sandstone Associates Limited Partnership-A, hereinafter "Sandstone", obtained a Judgment against the City of Novi pursuant to an Opinion and Order of the Oakland County Circuit Court in civil action 95-501532 - CK. On or about July 8, 1999, the Court amended the January 21,1999 Judgment pursuant to an Opinion and Order. On or about September 30, 1999, pursuant to an Order of the Court, the Court awarded Sandstone costs, interest, and attorneys fees, totaling approximately Fifty-Three Million Dollars.

Pursuant to the judgment obtained by Sandstone Associates Limited Partnership-A against the City of Novi per an Opinion and Order of the Oakland County Circuit Court in civil action 95-501532-CK Sandstone Associates Limited Partnership -A v The City of Novi, et al., an Agreement for Entry of Consent Judgment was executed on June 25, 2002. **(Appendix 18a-70a)** In lieu of paying the Judgment amount, this agreement contained provisions for the transfer by the City of Novi of approximately seventy-five (75) acres of land to Sandstone in settlement of the aforementioned Judgment.

The property conveyed to Sandstone pursuant to this agreement consisted of pristine and

undeveloped woodland and parkland behind the Plaintiffs/Appellants property.[1] **(Appendix 71a)** Plaintiffs/Appellants have lived there for many years. The land abutting Plaintiffs/Appellants properties was zoned as a park as part of City of Novi's Master Plan. The seventy-five (75) net usable acres of land contained certain deed restrictions prohibiting certain uses, particularly commercial use of the property.[2] The deeds concerning Plaintiffs/Appellants' properties' also contained these restrictions. **(Appendix 72a)** Pursuant to the settlement with Sandstone, the City of Novi was required to try to eliminate the restrictions contained in Plaintiffs/Appellants' deeds. The June 25, 2002 agreement specified that , if the City was not successful in eliminating these restrictions, additional property (approximately 10 acres) would be given to Sandstone. **(See Appendix 27a-30a)** If these restrictions were waived, Sandstone would be free to construct or develop commercial enterprises and other uses on the land abutting Plaintiffs/Appellants' property.

In July of 2002, the Defendant/Appellee, through its retained counsel, Gerald Fisher, approached Plaintiffs/Appellants and requested that they execute a document releasing their right to enforce these restrictions. Plaintiffs/Appellants were requested to release their right to enforce the deed restrictions created for the property owned by Plaintiffs/Appellants and for the surrounding property formerly owned by the Defendant/Appellee. **(Appendix 75a-76a)** The Release and Discharge of Restrictions which Plaintiffs/Appellants were requested to sign was not made part of the Agreement for Entry of Consent Judgment put forward to the citizens of Novi.

---

[1] It should be noted this parkland was located across 12 Mile Road from the Novi Fountainwalk, a collection of stores similar to the Great Lakes Crossing.

[2] These deed restrictions constituted negative reciprocal easements which are enforceable by abutting property owners under longstanding Michigan Law. Webb v Smith 204 Mich App 564, 516 NW2d 124 (1994) citing Sanborn v McLean, 233 Mich 227, 206 NW2d 496 (1926)

In an effort to determine their legal rights, Plaintiffs/Appellants retained counsel. In light of the City's offer, which contained a time limit for response (September 9, 2002), Plaintiffs/Appellants Counsel requested to review the Agreement, the master plan for the park and the deed, Release and title work relating to the property. **(Appendix 77a-78a)** Defendant/Appellee's voluntarily provided the agreement but only provided one exhibit to it, Exhibit O. Plaintiffs/Appellants Counsel then requested to review all drafts of the agreement and all the exhibits at Attorney Fisher's office on September 4, 2002.

On September 4, 2002, attorneys for the Plaintiffs/Appellants traveled to Attorney Fisher's office in order to review the drafts of the Agreement for Entry of Consent Judgment. When Plaintiffs/Appellants' Counsel attempted to view these documents, it was discovered that the exhibits provided were not in alphabetical order and certain exhibits had been "intentionally deleted."[3] **(Appendix 79a)** Despite requesting to review these deleted exhibits from Attorney Fisher, the deleted exhibits were not made available for Plaintiffs/Appellants Counsel to review.[4]

As a result, on September 4, 2002, Plaintiffs/Appellants duly served a Freedom of Information Request upon Defendant/Appellee, City of Novi requesting the following:

1. All exhibits, including but not limited to, exhibits G, T, U, V, W, AA, BB, GG, MM, NN and PP, for the Agreement for Entry of Consent Judgment dated June 25, 2002 between Sandstone and the City of Novi;
2. Any and all site plans from Sandstone regarding the 75 dedicated acres; and
3. Any and all title commitments on the 75 dedicated acres. **(Appendix 80a)**

In response to this request Plaintiffs/Appellants received from Defendant/Appellee the

---

[3] According to the lettering of the exhibits of the documents produced, the intentionally deleted exhibits were G, T, U, V, W, AA, BB, GG, MM, NN and PP.

[4] Despite Mr. Fisher's claim Plaintiffs/Appellants failed to wait 15 minutes for him, Plaintiffs/Appellants counsel waited considerably longer and left when no one could advise when Mr. Fisher would be available.

following response dated September 9, 2002:

> Extension of 10 days **(DUE- September 25, 2002 TO ALLOW STAFF ADDITIONAL TIME TO RESEARCH REQUESTED INFORMATION)**

This response stated that Plaintiffs/Appellants had requested "Exhibits G, T, U, V, W, AA, BB, GG, MM, NN and PP for Agreement for Entry of Consent Judgment dated June 25, 2002, all site plans for 75 dedicated acres and all title commitments on 75 dedicated acres between Sandstone and the City of Novi." **(Appendix 81a-83a)**.

On September 10, 2002, the City of Novi also deeded a right of way along Dixon Road which runs in front of Plaintiffs/Appellants' property. This deeding was done without notice to and without knowledge of Plaintiffs/Appellants. A "deleted" exhibit R.O.W (which was never incorporated into the Agreement for Entry of Consent Judgment) deeded a right of way along Dixon Road. **(Appendix 84a-85a)**. This right of way would come within 6 feet of Plaintiffs/Appellants' front porches.

On September 19, 2002 in submitting their response to Plaintiffs/Appellants, Defendant/Appellee **altered** Plaintiffs/Appellants request to read:

> All exhibits Agreement for Entry of Consent Judgment dated June 25, 2002 between Sandstone and the City of Novi; all site plans from Sandstone regarding the seventy-five dedicated acres; and any and all title commitments on the 75 dedicated acres.
>
> The Public Record of any and all site plans from Sandstone regarding the 75 dedicated acres does not exist. Please clarify item (3) Any and all title commitments on the 75 dedicated acres. You may call the City Clerk's office at (248) 347-0456. **(Appendix 86a.)**

In a correspondence dated September 26, 2002 in response to Plaintiffs/Appellants' request for the missing Exhibits, and any site on concept plan, **(Appendix 90a-91a)** Gerald Fisher stated "These exhibits do not exist, and never existed."**(Appendix 92a)** Despite Mr Fisher's assertion that

these documents never existed, Plaintiffs/Appellants' Counsel through their own continuing investigation located Exhibit AA. **(Appendix 94a-97a)**. Certain drafts of the agreement had made a reference to "Extra land", which was determined to be the property owned by Plaintiffs/Appellants. Additionally, review of the drafts of the Agreement for Entry of Consent Judgment indicated that portions of the agreement were deleted and turned into side agreements, eliminating them from the overall agreement which would become public record. **(Appendix 98a)** Other drafts had deletions which made reference to "Global" and "extra land". **(Appendix 99a)**

On October 16, 2002, Plaintiffs/Appellants requested all side agreements with respect to the Agreement as well as a copy of the "Global" referred to in the Agreement drafts. **(Appendix 100a)** In Attorney Fisher's response to Plaintiffs/Appellants request of October 21, 2002, Plaintiffs/Appellants request for "side agreements" was changed by Defendant/Appellee who referred to these as "side letters". Defendant/Appellee's Counsel further claimed they did not know what the "Global" reference was. **(Appendix 101a)**

As a result of this response, on November 1, 2002 Plaintiffs/Appellants duly served a Freedom of Information Act Request on Defendant/Appellee requesting the following:

1. Any and all side agreements entered into between the City of Novi and Sandstone and/or its attorneys or representatives;
2. Global readings on "extra land"; global positioning satellite (GPS) readings on "extra land.";
3. Settlement agreements, releases, copies of drafts in settlement of the insurance cases relating to this property; and
4. Copy of any and all deed or deeds from the City of Novi to Sandstone for 75 dedicated acres. **(Appendix 102a)**

In response, a City of Novi Freedom of Information Request Form dated November 6, 2002 was returned, indicating an extension of ten days was being taken **"TO ALLOW STAFF**

ADDITIONAL TIME TO RESEARCH REQUESTED INFORMATION."

In the Defendant/Appellee's response, the Plaintiffs/Appellants' request had again been altered, this time to read "Response to your inquiry on November 2, 2002 (via facsimile), requesting information regarding Sandstone". **(Appendix 103a-104a)** Plaintiffs/Appellants' specific request was not reiterated on the form.

Five side agreements were subsequently produced. **(Appendix105a-111a)** Defendant/Appellees denied Plaintiffs/Appellants request with regard to two documents stating:

> "The request is denied with regard to two documents representing commercial and/or financial information voluntarily submitted to the City of Novi for use in developing governmental policy in connection with the settlement of Oakland County Circuit Court litigation entitled *Sandstone v City of Novi*, Case No. 95-501532-CK, as contemplated and required under MCL 15.243(g)." [5] **(Appendix 115a)**

As a result, Defendant/Appellee did not produce all the side agreements referred to in the drafts of the Agreement for Entry of Consent Judgment. Defendant/Appellee did not produce Global Readings on the "extra land", or any global or settlement agreements. An Exhibit "R.O.W." was produced which was not referenced in the Agreement for Entry of Consent Judgment **(See Appendix 84a-85a)** Plaintiffs/Appellants' Counsel received a bill in the amount of $169.64, which accompanied the response from the Defendant/Appellee dated November 29, 2002. Duplication costs were itemized as $2.38, actual labor costs totaled $17.26, and Plaintiffs/Appellants were charged a $150.00 attorney fee for the production of the other side agreements **(Appendix 116a-118a)**

In response to Defendant/Appellee's denial of September 26, 2002 and because of the Defendant/Appellee's refusal to produce the intentionally deleted exhibits, the side agreements, and

---

[5] Defendant/Appellee mis-cited the proper FOIA section, it should have been (f).

Plaintiffs/Appellants' other FOIA requests on January 15, 2003, Plaintiffs/Appellants filed an 83 Count Complaint detailing the Defendant/Appellee's denial of Plaintiffs/Appellants FOIA requests. **(Appendix 119a-237a)**

After filing a response, Defendant/Appellee forwarded Request for Admissions and Interrogatories to Plaintiffs/Appellants on March 3, 2003. These interrogatories and Request for Admissions were extensive totaling 15 Request for Admissions with 35 subsections (in essence 50 Request for Admissions) all of which were answered by Plaintiffs/Appellants in a timely manner. **(Appendix 238a-250a)**. On March 10, 2003 Plaintiffs/Appellants forwarded Request for Admissions and Interrogatories to Defendant/Appellee. **(Appendix 251a-274a)**. These were never responded to by Defendant/Appellee. Defendant/Appellee filed a Motion for Protective Order, Extension of Time, and a Motion to Strike. **(Appendix 275a-283a)**

Plaintiffs/Appellants filed a Response to this motion **(Appendix 284a-293a)** and Motion to Deem Responses Admitted, to Strike Pleadings or for a More Definite Statement Pursuant to MCR 2.115(a) and (b) on March 10, 2003. **(Appendix 294a-312a)** Per it's Order of March 31, 2003 Plaintiff's Motion to Deem Responses Admitted, and to Strike Pleadings was denied by the Trial Court. Defendant/Appellee's Motion to Strike was also denied. On the same date, the Court appointed a Discovery Master to make recommendations to the Court regarding the parties discovery requests. **(Appendix 313a-315a).** The Trial Court issued a scheduling order dated April 5, 2003 providing a discovery period which was to conclude on August 5, 2003. **(Appendix 316a)**

A meeting with the Master took place on April 17, 2003, at which time a proposed framework for settlement of the discovery issues were discussed. Over the next month, several proposed settlement agreements and correspondence were exchanged in an attempt to resolve the

case. However, certain issues could not be agreed upon and Defendant/Appellee insisted upon an immediate dismissal with prejudice. Plaintiffs/Appellants could not agree to a dismissal with prejudice before the underlying actions regarding providing the documents had occurred or concluded.[6]

Equipment began using the road in front of Plaintiffs/Appellants' property (Dixon) to access the land for development. During this period, the property behind Plaintiffs/Appellants' property was razed. **(Appendix 317a)** Persons trespassed on Plaintiffs/Appellants' property and marked trees. **(Appendix 318a)**

Because a settlement agreement could not be reached, on July 23, 2003 Plaintiff noticed the depositions of Mayor Richard Clark, City Manager Richard Helwig, Novi City Clerk Maryanne Cornelius and Council Members Kim T. Capello, Lewis Csordas, David B. Landry, Laura Lorenzo, Siddharth "Mav" Sanghvi as well as Gerald Fisher and Leonard Schwartz[7]. **(Appendix 319a-328a)** On July 31, 2003 Defendant/Appellee filed a Motion to Establish Scheduling Order, Reschedule or Remove Case from Case Evaluation and for Protective Order prohibiting Plaintiffs/Appellants from taking the depositions of the above referenced individuals. Defendant/Appellee refused to produce any of the individuals noticed for deposition. Defendant/Appellee filed a Motion for Summary Disposition on August 12, 2003. The Motion for Protective Order was heard on August 13, 2003. Following the hearing on August 13, 2003, the Court issued an order holding in abeyance any discovery and depositions, set a briefing schedule for Defendant/Appellee's Motion for Summary Disposition and set a Conference to discuss the entire matter with all interested parties. **(See**

---

[6] Plaintiffs/Appellants' suggestion of a dismissal without prejudice was rejected.

[7] Mr. Schwartz participated in the negotiations of the Sandstone settlement.

Appendix 1a-2a)

The Court heard oral arguments on the Motion for Summary Disposition on October 22, 2003.[8] **(Appendix 329a-344a)** A conference regarding this case was held on October 23, 2003 in chambers.[9] **(Appendix 345a-370a)** At that time, the Court indicated that it would hold an *in camera* review of the two non-disclosed side "letters" to determine whether the "letters" were to be produced. **(See Appendix 368a)** At that time, the Court also set a briefing schedule by the parties in regards to the issue of the side "letters". The side "letters" were not provided to Plaintiffs/Appellants Counsel for review. At the in Chambers meeting, Attorney Fisher indicated to the Court that the letters were submitted to encourage the City to purchase Plaintiffs/Appellants property. **(See Appendix 356a)** Mr. Fisher stated;

> ...but as I indicated, there was an obligation on the part of the City or an understanding in the agreement itself, which Plaintiffs have, to the effect that the City has - - has an obligation to clear this alleged deed restriction claim up within six months, and if they're unable - - they were unable to do that, then the City had certain other obligations to transfer land at the election of Sandstone. **(Appendix 255a)**

Sandstone's counsel, Mr. Carson indicated that the properties contained restrictions that might apply to the land Sandstone was being deeded. **(See Appendix 362a)** Counsel for Sandstone claimed in Chambers that the side "letters" between Sandstone and the City was made available to the public. **(See Appendix 363a)** However, the side agreements were never made available, and their existence never made known to the public until after Plaintiffs/Appellants' FOIA request.

The Court subsequently issued it's ruling in regard to the side "letters" on December 19, 2003

---

[8] The Order regarding this motion was settled and entered on January 27, 2004.

[9] The transcript incorrectly refers to this meeting as a conference call. It actually took place in chambers. Robert Carson, attorney for Sandstone was also present.

holding that the side "letters" did not need to be produced. **(See Appendix 5a-6a)** Plaintiffs/Appellants filed a Motion for Reconsideration arguing that the Court had not made the particularized findings as required by the cases Nicita v City of Detroit, 216 Mich App 746, 550 NW2d 269 (1996), Evening News Assn v City of Troy, 417 Mich 418, 339 NW2d 421(1983) and the FOIA to uphold the exemption claimed by Defendant/Appellee. **(Appendix 371a-378a)**

The Court issued it's Order on Defendant/Appellee's Motion for Summary Disposition on January 27, 2004, stating that based upon the Affidavit of Mayor Richard Clark, the Court found the site plan and global readings Plaintiffs/Appellants requested did not exist. The Court further held that the depositions scheduled by Plaintiffs/Appellants would be "duplicative" and precluded Plaintiffs/Appellants from taking them. **(See Appendix 9a)**

As to the attorney fee charged to Plaintiffs/Appellants, the Court stated the FOIA did not allow for the payment of attorney fees but indicated that it would hold a hearing at a subsequent date to determine the reasonable cost for duplication of documents. The Court also ruled that the intentionally deleted exhibits were not relevant, and the Defendant/Appellee would not be required to turn them over to the Plaintiffs/Appellants. Plaintiffs/Appellants filed a motion for reconsideration of this order on February 4, 2004. **(Appendix 379a-389a)**

The evidentiary hearing regarding the $150.00 attorney fee took place on March 22, 2004. **(Appendix 390a-467a)** Since the Trial Court had not ruled on Plaintiffs/Appellants' Motions for Reconsideration before the date of the evidentiary hearing, the Court indicated it would make it's ruling regarding all of Plaintiffs/Appellants' motions for reconsideration at that time. The Novi City Clerk, Maryanne Cornelius testified. After the evidentiary hearing, the Court issued it's ruling denying Plaintiffs/Appellants motions for reconsideration of the December 19, 2003 and January 27,

2004 Orders. The Court further ruled that the $150.00 attorney fee was appropriately charged, holding that Gerald Fisher was an employee with the City of Novi for the purposes of responding to Plaintiffs/Appellants' FOIA requests under the statute. The Trial Court entered it's Order in this regard on April 21, 2004. **(See Appendix 10a-11a)** Plaintiffs/Appellants' Claim of Appeal was filed on May 4, 2004.

The Court of Appeals affirmed in Coblentz, et al v City of Novi, decided November 23, 2004, 264 Mich App 450 (2005).

ARGUMENT

1. This Court should reverse the Court of Appeals' ruling that failed to require Defendant/Appellee to turn over the missing and intentionally deleted exhibits which were not exempt under any FOIA exemption

The Court of Appeals found that the Trial Court's ruling constituted error regarding Plaintiffs/Appellants Freedom of Information Act Request concerning the intentionally deleted exhibits. Nonetheless, it ruled that the Trial Court reached the correct result for the wrong reason. The Court of Appeals 'mis-interpreted' Plaintiff's Freedom of Information Act Request stating that Plaintiff's request of September 4, 2002 sought only the exhibits that were made part of the final agreement. This is clearly erroneous based upon the unambiguous language of the request itself. The request was specific and requested all exhibits, including but not limited to Exhibits G, T, U, V, WW, A, BB GG, MM, NN, PP for the agreement for entry of consent judgment dated June 25, 2002 between Sandstone and the City of Novi. The Court of Appeals provided no basis for its interpretation, other than to claim that the Plaintiffs/Appellants sought only exhibits for the June 25, 2002 final agreement, and not the intentionally deleted exhibits.

Well established case law including, Stone Street Capital, Inc. v Michigan Bureau of State Lottery 263 Mich App 683 (2004), Booth Newspapers, Inc. v University of Michigan Board of Regents, 444 Mich 211, 507 NW2d 422 (1993), and Herald Company, Inc. v Tax Tribunal, 258 Mich App 78, 669 NW2d 862 (2003), Thomas v City of New Baltimore, 254 Mich App 196, 657 NW2d 530 (2003), Scharret v City of Berkley, 249 Mich App 405, 642 NW2d 685 (2002), Thomas v State Board of Law Examiners, 210 Mich App 279, 533 NW2d 3 (1995) have held that under the FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233 (1); MSA 4.1801(3)(1).

The FOIA is a pro disclosure statute and confers upon the public a right to inspect non-exempt public records. In Swickard v Wayne County Medical Examiner, 438 Mich 536, 475 NW2d 304 (1991), the Supreme Court held that the Freedom of Information Act is intended primarily as a pro disclosure statute and exemptions to disclosure are to be narrowly construed. See also, Federated Publications Inc. v City of Lansing, 467 Mich 98, 649 NW2d 383 (2002). A policy of full disclosure underlies the Freedom of Information Act. Nicita v City of Detroit, 550 NW2d 269, 216 Mich App 746 (1996).

In Thomas v City of New Baltimore, 254 Mich App 196, 201; 657 NW2d 530 (2003), the Court reiterated the basic principles on which the FOIA is grounded:

> The FOIA is a mechanism through which the public may examine and review the workings of government and its executive officials. It was enacted to carry out this state's strong public policy favoring access to government information, recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties. By its express terms, the FOIA is a prodisclosure statute; a public body must disclose all public records not specifically exempt under the act.
>
> The Freedom of Information Act presumes that all records are subject to disclosure unless

the public body can show the requested information falls within one of the statutory exemptions. See Farrell v City of Detroit, 209 Mich App 7, 530 NW2d 105 (1995). When the public body refuses to disclose documents requested under the Freedom of Information Act, the public agency bears the burden of proving that the refusal was justified. See Swickard, *supra*. The party requesting information in a FOIA action need only show that the request was made and denied; thereafter, the burden is on the agency to show a viable defense. Pennington v Washtenaw Co Sheriff, 125 Mich App 556, 564-565, 336 NW2d 828 (1983).

The Trial Court's ruling implicitly indicated that the Plaintiffs/Appellants had requested those documents, but denied production predicated on a "lack of relevance" basis. In fact, the Court Order of January 27, 2004 stated "further the ones that have not been turned over are those that were taken out and these are no longer relevant." **(See Appendix 9)** The Trial Court never made a finding that the Plaintiffs/Appellants had not specifically requested the deleted exhibits, or that they were exempt under the FOIA. The Trial Court only found that they lacked relevance, in that they were not made part of the final agreement. The Court of Appeals correctly held that "lack of relevance" was not included among exemptions from disclosure under MCL 15.243, and correctly noted that this constituted error. While the Court of Appeals recognized this error, it failed to correct it, and made its own determination of what Plaintiffs/Appellants request was. In doing so, the Court of Appeals ignored the specific language Plaintiffs/Appellants utilized in their request and went beyond the Trial Court's determination to do so.

The record demonstrated Defendant/Appellee clearly understood Plaintiffs/Appellants request based on their own correspondence. Defense counsel's response to Plaintiffs/Appellants' initial Freedom of Information Act request dated September 26, 2002 stated:

1. Exhibits G, T, U, V, WW, A, BB GG, MM, NN, PP: I have advised you by phone and letter that there are no such exhibits. The reference in the index indicated that they were intentionally deleted, is merely to clarify for the reader that such exhibits have not been lost or detached from the agreement. **These Exhibits do not exist, and never existed.** (*Emphasis added*). **(See Appendix 92a)**

The Defendant/Appellee was aware that the particular exhibits, G, T, U, V, W, AA, BB, GG, MM, NN and PP existed at some point, as their initial response listed these exact exhibits which were requested by the Plaintiffs/Appellants. **(See Appendix 81a)** Defendant/Appellee claimed that no such exhibits ever existed despite the fact that these exhibits were intentionally deleted from the Agreement for Entry of Consent Judgment. The Defendant/Appellee had altered the Plaintiffs/Appellants request to read that they were producing "All exhibits Agreement for Entry of Consent Judgment dated June 25, 2002" in an effort to forgo having these documents made public and produce same to Plaintiffs/Appellants.

Why would Plaintiffs/Appellants specifically delineate the exhibit numbers if they had only wanted the exhibits to the final agreement? The Court of Appeals never addressed this argument, despite the fact that the deleted exhibits requested were specifically set forth by letter in the request. In essence, the Trial Court and Court of Appeals adopted the Defendant/Appellee's interpretation of Plaintiffs/Appellants' request, rather than Plaintiffs/Appellants who had actually made the request.

To avoid this incongruity, Defendant/Appellee attempted to change Plaintiffs/Appellants' request for the particularly named exhibits into a request for exhibits attached to the final Consent Agreement dated June 25, 2002. Plaintiffs/Appellants' multiple requests for the specific lettered "intentionally deleted" exhibits could not have been more clear. The Court of Appeals ignored the plain language of Plaintiffs/Appellants' request which was ALL exhibits for the agreement. All means everyone of. For means with regard to or with respect to. Webster's Universal Encyclopedic

Dictionary, 2002 Edition. Defense counsel's correspondence indicated that they were aware of what Plaintiffs/Appellants wanted, yet, claimed that these exhibits never existed. Despite Defendant/Appellee's denial of the existence of the exhibits requested, Plaintiffs/Appellants located Exhibit AA. **(See Appendix 94a)**. This discovery forced Defendant/Appellee to change their argument to claim that they didn't exist as "part of the final agreement."

Defense counsel never indicated to Plaintiffs/Appellants' counsel that these exhibits existed in draft form, but stated that they did not exist at all and never did. No grounds ever existed for the failure to produce these documents. No FOIA exemption was ever cited by either the Trial Court or the Court of Appeals in denying production of these requested documents. Defendant/Appellee repeatedly attempted to reinterpret the Plaintiffs/Appellants' FOIA request so they could claim these documents never existed so as not to produce them. It is only after being confronted with irrefutable evidence (i.e. Exhibit AA) that Defendant/Appellee tried to change Plaintiffs/Appellants' request to attempt to get around the existence of the "deleted exhibits".

Plaintiffs/Appellants provided the missing and intentionally deleted Exhibit AA to the Trial Court in its Complaint and Response to Defendant/Appellee's Motion for Summary Disposition. At a minimum, this demonstrated an issue of fact regarding the existence of the missing exhibits. Plaintiffs/Appellants could have explored upon deposition what the "deleted" exhibits were; when they were authored; whether they were made into global agreements or were transformed into side agreements concerning Plaintiffs/Appellants property. Plaintiffs/Appellants attempts to determine through discovery if Defendant/Appellee had complied with the FOIA were thwarted by the Trial Court ruling of August 19, 2003 holding in abeyance Plaintiffs/Appellants attempts to obtain discovery and depositions. This ruling precluded the Plaintiffs/Appellants from presenting relevant

information so the Trial Court could make a decision in accordance with the applicable law. Based on the documents, Defendant/Appellee's response, and the evidence presented by Plaintiffs/Appellants, Summary Disposition should not have been granted. This was error, contrary to the FOIA and longstanding case law. The Court of Appeals correctly recognized that there is no exception for "relevancy" under the FOIA, yet failed to correct this error. Defendant/Appellee claim that it complied with the Act by producing only the documents to the final agreement did not correspond to the request. The FOIA requires that Defendant/Appellee must produce what was requested unless exempt. No exemption was ever cited for non-disclosure. The law does not allow Defendant/Appellee to "re-interpret" Plaintiffs/Appellants' request. A request under the FOIA should be broadly construed. If Defendant/Appellee was unsure of the request they could have asked for clarification.[10] Instead, through their counsel, they denied that these documents ever existed. How can something be intentionally deleted if it never existed? There was no finding by the Trial Court, at any time, that Plaintiffs/Appellants did not request the specific documents. In fact, the request was for all exhibits for the agreement. Nothing in the request limited it to documents attached to the final agreement. In fact, the words"final agreement" is never used in the request. The request was more then sufficiently descriptive for City of Novi to find the records. See Thomas v New Baltimore, 254 Mich App 657 NW2d 530 (2002). Defendant/Appellee could have simply responded by providing the deleted exhibits to Plaintiffs/Appellants.[11]

The City's failure to provide the documents that were in their possession and part and parcel

---

[10] Defendant/Appellee did this in its September 19, 2002 response to Plaintiffs/Appellants' September 4, 2002 request. **(See Appendix 86a)**

[11] Plaintiffs/Appellants' review of the drafts of the settlement agreement revealed the existence of the side agreements. Review of these intentionally deleted exhibits could reveal the existence of other side agreements or "letters" or some other type of deal or agreement relating to this property.

of their agreement with Sandstone greatly affected Plaintiffs/Appellants. Plaintiffs/Appellants stood to suffer significant and irreparable harm including, the diminution of the value of their property, commercial developments abutting their property, a right of way within six (6) feet of their homes, violation of valid deed restrictions, non conforming use of adjoining property and other damages. No basis in law existed for failure to turn these documents over to the Plaintiffs/Appellants. This decision should be overturned and Defendant/Appellee should be ordered to turn the requested documents over to Plaintiffs/Appellants immediately, and award costs and attorney fees to Plaintiffs/Appellants as provided under the FOIA.

2. **This Court should reverse the Court of Appeals' decision that Defendant/Appellee did not have to provide documentation regarding Global Agreements and/or Readings and any Site Plans where Plaintiffs/Appellants were denied any discovery. This Court should uphold that discovery is allowable in FOIA cases to insure compliance with FOIA requests.**

The Court of Appeals upheld the Trial Court's decision to preclude discovery regarding any Global Agreements, GPS readings or surveys and Site Plans requested by Plaintiffs/Appellants. This is in direct contravention of the well established case law of this State and the Michigan Court Rules allowing for full and fair discovery. The Court of Appeals did not cite any authority in support of its ruling other than to accept Defendant/Appellee's Affidavits as totally dispositive. Neither the Court of Appeals, the Defendant/Appellee, nor the Trial Court set forth any cases which held that discovery is not allowed in a FOIA case. A recent unpublished decision of the Court of Appeals confirmed that discovery in a FOIA case is necessary in order to ensure that complete disclosure occurs.

> "In fact, discovery was necessary to verify Plaintiff indeed now had a complete copy of the requested materials." Hammond Bay v Miller, Unpublished Case No. 244966, 246058 (January 27, 2004) **(See Appendix 471a)**

It is well established law that summary disposition should not be granted if there is any genuine issue of material fact to be determined. Smith v Globe Life Insurance Company, 460 Mich 446, 597 NW2d 28 (1999). Michigan law has recognized that summary disposition is premature when granted before completion of discovery on an issue. *See* State Treasure v Sheko, 455 Mich 856, 567 NW2d 248 (1997).

In Kassab v Michigan Basic Property Insurance, 185 Mich App 208, 460 NW2d 300 (1990) summary disposition pursuant to MCR 2.116(C)(10) was deemed premature as no discovery had taken place before summary disposition was argued or considered. Generally, summary disposition is premature if discovery concerning a disputed issue is incomplete. Adams v Perry Furniture Co., (*on remand)*, 198 Mich App 1, 497 NW2d 514 (1993); Ransburg v Wayne County, 170 Mich App 358, 427 NW2d 906 (1988). In LaMothe v ACIA, 214 Mich App 577, 543 NW2d 42 (1995), the Court of Appeals held that because a genuine issue of material fact existed and since discovery had not been completed, the Trial Court erred in granting Defendant/Appellee's Motion for Summary Disposition under MCR 2.116(C)(10).

It is axiomatic that the Defendant/Appellee participated in the preparation the agreement, not the Plaintiffs/Appellants. Plaintiffs/Appellants made inquiry as to what the "global" notation referred to. **(See Appendix 100a)**. Defendant/Appellee claimed they did not know what "global" was. **(See Appendix 101a)** As such, Plaintiffs/Appellants were required to guess as to what this "global" notation referred to in attempt to make a Freedom of Information Act request. Subsequently, the Plaintiffs/Appellants were prohibited from being able to depose any of the Defendant/Appellee representatives regarding the referenced "Global" on the draft of the Consent Judgment Agreement as a result of the Court's Orders of August 19, 2003 and January 27, 2004.

Defendant/Appellees never answered any of Plaintiffs/Appellants discovery directed to this issue, and never produced any of the requested individuals for deposition. They merely produced an Affidavit claiming that no such global survey existed. **(Appendix 474a)**

The Court of Appeals based their decision solely on the fact that Plaintiffs/Appellants had provided no evidence supporting their position which would result from further discovery. Yet, Plaintiffs/Appellants were completely prohibited from questioning anyone regarding the meaning of the handwritten reference to 'Global' on the draft of the Consent Judgment and Agreement.[12] Was it a global agreement, readings, or some other meaning unknown to Plaintiffs/Appellants? Plaintiffs/Appellants were left only to guess of what this meant.[13]

The drafts of the agreements provided to Plaintiffs/Appellants clearly referenced a portion of the agreement which was deleted and replaced with some reference to a "global." [14] Since Plaintiffs/Appellants were precluded from conducting any discovery as to what this reference concerned; what it referred to, and its relation to the agreement and their property, they were prohibited from presenting what the Court of Appeals held was necessary to avoid Summary Disposition.

The same reasoning is applicable to the "site plans" request. Plaintiffs/Appellants supplied the Trial Court pictures and documentation indicating that the property had been cleared of trees and grading had been undertaken. In fact, someone had trespassed on Plaintiffs/Appellants property and

---

[12] It should be noted, this reference appeared in a section of the agreement concerning "extra land". Defendant/Appellee had admitted in their pleadings that "extra land" referred to Plaintiffs/Appellants property.

[13] Indeed, Plaintiffs/Appellants request of November 1, 2002 at number 3, requested all settlement agreements in an attempt to obtain any agreements this "global" reference might concern. **(See Appendix 102a)**

[14] Defendant/Appellee's correspondence of October 21, 2002 regarding Plaintiffs/Appellants' request for clarification stated "with respect to the "global", I do not know what this is." **(See Appendix 101a)**

tagged trees. Plaintiffs/Appellants produced Exhibit ROW which showed a right of way that had been granted in relation to the street in front of their homes. Plaintiffs/Appellants produced to the Trial Court photographs of the demolition taking place behind Plaintiffs/Appellants property as well as photographs of the land pre-demolition. **(See Appendix 71a and 317a)** Clearly, in order to undertake this grading and site preparation, some sort of site or other plan must have been in existence. In fact, Plaintiffs/Appellants' correspondence of September 20, 2002 attempted to determine what type of site or concept plan existed for this property. **(See Appendix 90a-91a)** As with the deleted exhibits, Defendant/Appellee denied any such plan existed.

The Court of Appeals based their ruling on the fact that Plaintiffs/Appellants submitted no affidavit from any person or someone "working for the city" stating that filing a site plan is customary before such activity is undertaken. Given that the matter was in litigation, and Defendant/Appellee was represented by Counsel, it would have been in contravention of Rules of Professional Conduct to contact or attempt to obtain an affidavit from an opposing party represented by Counsel. *See* Rule 4.2, Rules of Professional Conduct. Any requirement that a FOIA litigant violate the Rules of Professional Conduct to avoid summary disposition should not be allowed to stand.

Pursuant to the Court's Orders of August 19, 2003 and January 27, 2004, Plaintiffs/Appellants they had been precluded from taking depositions of city officials; obtaining city documents, and receiving answers to written discovery requests. Plaintiffs/Appellants provided the only information they could, including photographs of what was going on at the property. Theses Court rulings made it impossible to meet the standard the Court of Appeals set forth to overcome summary disposition. At the very least, a question of fact existed whether there were any site or other

differently named plans regarding the property as evidenced by the demolition and property alterations were being undertaken. Plaintiffs/Appellants were precluded by the Court by it order of taking depositions of the relevant persons to determine if such documentation did exist so it could be requested or a more specific request formulated.

The Trial Court's failure to allow discovery was contrary to the Court's Scheduling Order and the public policy of the FOIA a pro disclosure statute. See MCL 15.231(2). The Trial Court was required by Michigan law to consider all of the documents and information supplied by the Plaintiffs/Appellants in the light most favorable to the Plaintiffs/Appellants before summary disposition could be granted. *See* Smith, *supra.* The individuals noticed for deposition, possessed relevant information in regard to these issues including the existence and content of the other items requested pursuant to the FOIA by Plaintiffs/Appellants.

The Michigan Court Rules provide for full discovery in litigation.

MCR 2.302(B)(1) *Scope of Discovery*

> *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of person having knowledge of a discoverable matter. It is not ground for objection that the information should will be inadmissable at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *(Emphasis added.)*

The Trial Court had issued a Scheduling Order setting forth discovery dates. Defendant/Appellee's substantial discovery requests to Plaintiffs/Appellants were all answered. Defendant/Appellee did not do the same, and in fact did not respond to any of Plaintiffs/Appellants' written discovery requests, and refused to produce relevant persons for deposition. At the motion

hearing regarding the depositions, Defense counsel argued to the Trial Court that there was no need for the Plaintiffs/Appellants to take the scheduled depositions as same were "aside" from the FOIA issues in this case. **(Appendix 480a)** Defense counsel had submitted Affidavits by Mayor Clark in its Motion for Summary Disposition and requested the Court to accept all factual assertions within the Affidavits as true without allowing Plaintiffs/Appellants to cross examine the affiant in regard to the "facts" set forth in the Affidavit. Plaintiffs/Appellants were severely prejudiced because Defendant/Appellee did not permit the depositions to be taken of its representatives during the discovery period. A genuine issue of material fact existed with regard to the existence of the requested documents that should have precluded summary disposition.

If this decision is allowed to stand, discovery in FOIA cases can be effectively prohibited or may no longer be required. FOIA responders need only provide affidavits contrary to FOIA requesters' assertions and summary disposition will be granted. FOIA requestors will not be able to test these Affidavits by deposition or other discovery methods. If a requestor cannot question any of individuals regarding these aspects of requested documentation, then the public policy set forth in the FOIA is undermined.

There is no language in the Act whatsoever that prohibits discovery in a FOIA case. In fact, discovery would promote the public policy set forth in the Act. It is generally the case that a FOIA requestor does not have complete or even accurate information concerning documents that are generated including when or how they are described or titled. This Court in Federated Publications v City of Lansing, 467 Mich 989 (2002) recognized that since the public body is in possession of the documents it is in the best position to know what it possesses, the nature of its contents, and how it has categorized the information sought to be disclosed stating;

> The requester may be unaware of what records the public body possesses, how such records have been categorized or the precise nature of their contents. Such a disparity in information suggests that the public body will often be in the best position to categorize the information sought to be disclosed. *Citing* Vaughn v Rosen, 157 US App DC 340, 484 F2 820 (1972).

This is especially true in the present case, where Defendant/Appellee consistently changed the language that it used in describing things. For example, in the drafts of the agreement utilize the term "side agreements." Yet, throughout this case, Defendant/Appellee have referred to these "agreements" as "side letters." How is a FOIA requestor to formulate a request when they are not allowed to conduct discovery or question the person(s) who formulated, developed and named documents? The ramifications of this type of conduct would undermine the public policy behind the FOIA. A FOIA responder would need only to redefine or re-label a document to prevent disclosure. This is not what the legislature envisioned when it passed the Act and set forth the public policy in the statute. The public policy underlying the FOIA would be undermined if discovery could be effectively prohibited. Without the opportunity to question the individuals were involved in production of these documents, it becomes next to impossible to determine what was produced or what it was called so as to determine whether a FOIA request was complied with. This Court should make clear that once FOIA litigation is filed,[15] discovery is not prohibited and in fact serves the public policy set forth by the legislature. The Michigan Court Rules allow for discovery. If, as occurred in the present case, a party can prohibit discovery, then request summary disposition based solely on affidavits it submits is manifestly unfair and undermines the entire judicial system. Deposition testimony is one of the most effective techniques in which to gain information in regards

[15] MCL 15.240(1)(a)(b) specifically allows for the remedy of a Circuit Court action if a FOIA request is denied.

the resolution of disputes, particularly in regards whether documents exist, are identified or have been completely produced. It would undermine the public policy behind the FOIA to require a FOIA responder to precisely identify the documents requested and if not produced and, FOIA litigation is commenced, be precluded from discovery regarding same.

This basic legal principle of open and fair discovery set forth the Hammond Bay, Smith, State Treasure, Kassab, Adams, Ransburg, LaMothe, Townsend, and American Community Mutual Insurance Co., decisions as well as MCR 2.302 should be upheld.

3. The side "letters" withheld by Defendant/Appellee did not constitute the development of governmental policy pursuant to MCL 15.243(1)(f). This Court should overrule the Court of Appeals' redefinition of what constitutes a development of a governmental policy and a trade secret or financial information under the FOIA.

The Court of Appeals decision redefined what constitutes "a governmental policy" as well as "the development of a governmental policy" under the FOIA. Under the Freedom of Information Act, a public body must disclose all public records that are not specifically exempted by the Act. See MCL 15.233(1). The exemptions are to be narrowly construed and the burden of proof is on the party claiming the exemption. See Booth Newspapers, Inc. v University of Michigan Board of Regions, 444 Mich 211, 507 NW2d 422 (1993).

A. That resolution of the specific circumstances involving Plaintiffs/Appellants property does not constitute development of a public policy under the FOIA

After its *in camera* review, the Trial Court held that the requested "letters" contained financial or commercial information voluntarily submitted to the City used in the development of governmental policy. The Court of Appeals upheld this decision. The Trial Court and the Court of Appeals claimed these "letters" related to how the Defendant/Appellee intended the settle the

Sandstone litigation ("a situation with the potential to bankrupt the City and seriously impact its residents") **(Appendix 16a)** and this "concerned"governmental policy. However, as was argued to the Trial Court and the Court of Appeals, these dangers were no longer present at the time these letters were issued! The Defendant/Appellee and Sandstone had already entered into a settlement agreement on June 25, 2002. The agreement clearly set forth what would occur if the City was not able to clear the deed restrictions, which was the forfeiture of an additional 10 acres of property. No additional money would exchange hands. The side "letters" did not change or amend this agreement. Given the fact that 75 acres of parkland had already been ceded to Sandstone for the agreement of June 25, 2002, there could be no danger of bankruptcy or adverse financial impact upon the City of Novi's residents. There was no further negotiation on the terms of the agreement as relied on by the Court of Appeals in making its decision as the June 25, 2002. The agreement clearly enunciated what would occur if the restrictions were not waived. **(See Appendix 27a-30a)** Thus, the Coblentz rationale that these "letters" "concerned" public policy, i.e. bankrupting the City, financially impacting its residents, or involving further negotiation of the agreement was in error. The language of the statute is clear that the "trade secrets or financial information" voluntarily provided must be used in the development of governmental policy, and not merely concern public policy. As such, the Court of Appeals decision was contrary to the specific language of the statute.

More importantly, the Coblentz decision conflicts with the Court of Appeals decision in Herald Company, Inc. v Tax Tribunal, 258 Mich App 78, 669 NW2d 862 (2003), [the only other case which addresses MCL 15.243(1)(f)], which held that a single tax determination regarding a single taxpayer lacked the policy making potential contemplated by the legislature in drafting this exemption.

In Herald, *supra* a corporation (Amway) challenged its property tax assessment. A local newspaper brought an action alleging violations of the Open Meetings Act, and the hearing referee issued a protective order holding Amway's financial information confidential. The newspaper then made a Freedom of Information Act request which was denied on the basis that the information was kept confidential for use in developing governmental policy. The Court of Appeals found that this did not constitute development of a governmental policy stating:

> The underlying tax assessment challenge was simply a tax determination involving a single tax payer, lacking the policy making potential contemplated by the legislature in drafting this exemption to the Freedom of Information Act, since the individual tax determination did not involve the development of governmental policy, MCL 15.243(1)(f) did not apply. (*Emphasis added*).

Despite being argued to the Court of Appeals, the Cobentz Court never mentioned, distinguished or even addressed the Herald decision in its ruling!

The e-mail dated Monday, November 11, 2002 from Gerald Fisher, Attorney for the Defendant/Appellee, to Robert Carson, Attorney for Sandstone, identified the two side agreements and referenced their contents, left no doubt that the subject side agreements directly related to Plaintiffs/Appellants' property. (**Appendix 485a**).

One withheld "letter" apparently identifies the properties the City planned to purchase, and the prices Sandstone was willing to pay for them. The second "letter" identified the properties whose deeds contained restrictions that might support a claim of prohibiting commercial use on the portion of the Sandstone property. Certainly, this information is not a "trade secret" and Plaintiffs/Appellants would argue this is not the "financial information" contemplated by the

legislature in enacting this exception.[16]

The "letters" in question involved particular pieces of property involving particular individuals (i.e. the Plaintiffs/Appellants). What possible development of governmental policy was invoked by a letter identifying properties that contain deed restrictions prohibiting certain uses of Sandstone's property? These "letters" did not involve the development of any type of legislative or governmental policy. The "letters" related to specific individuals, and specific deed restrictions contained in the title of the specific properties which are not contained in the deeds of all the citizens of Novi.

The City of Novi admitted these "letters" were provided to influence the City on how to clear the deed restrictions in a manner favorable to Sandstone, not its own citizens.[17] As such, it was clear the "letters" related only to the Sandstone case and that case alone. No other litigation regarding the City was involved. The settlement agreement involving Sandstone was reached on June 25, 2002. The resolution of the Sandstone case could not be considered the development of any governmental policy as contemplated by the legislature pursuant to the FOIA. Defendant/Appellee did not submit any minutes, testimony, or Affidavit of any governmental official indicating what governmental

---

[16] Since Plaintiffs/Appellants' have not had the benefit of reviewing the withheld "letters" it is difficult, if not impossible for Plaintiffs/Appellants to determine if the information in the "letters" constitutes a trade secret or financial information under the FOIA and who it was submitted to. Further, Section (f) indicates that the information is to be provided to an "agency" which is undefined while subsections (i)-(iii) refer to "public body" which is specifically defined at 15.232(d)(iii). If the "letters" were submitted to the City of Novi and not an "agency" of Novi, under the clear language of the Act they should not be exempt. Clearly, by use of these different terms, the legislature wanted to limit the situations where this exemption could be claimed i.e. submission to an agency of, not the actual public body is required for exemption.

[17] The City took the position these "letters" were not agreements. Therefore, taking the City's position, if these "letters" are not side agreements relating to settling the Sandstone case how can something that is not an agreement be regarded as establishing any governmental policy?

policy was debated or developed as a result of these "letters".[18] Defendant/Appellee made no showing that these "letters" (which were kept out of the final agreement) were discussed, voted on or debated in any manner or form in an open meeting before the public. Should a governmental policy be a secret? How does this comport with the public policy set forth in the Act to allow the public to be informed so as to fully participate in the democratic process? The governmental policy that was established after these "letters" were submitted was never set forward. Defendant/Appellee never demonstrated by providing meeting minutes or by other proclamation that this ever occurred. This is precisely why Defendant/Appellee kept referring to these documents as "letters" as opposed to agreements, because it realized that if these documents constituted agreements, it may have violated the provisions of the Open Meetings Act.

Clearly, these letters involve solely Plaintiffs/Appellants properties, not any City wide "governmental policy." Given that the required notification of the existence of the "letters" was not put on file, until 5 months and after Plaintiffs/Appellants' FOIA request, the development of any government policy could not have been involved.

Blacks' Law Dictionary 4th Edition (1968) defines policy as "the general principles by which a government is guided in its management of public affairs." For example, the governmental policy behind a speed limit designation is to promote safe roads and driving. The speed limit is not directed at individual drivers. Each driver does not have his own personal speed limit. Since the subject "letters" were particularized to the subject properties (i.e. the Plaintiffs/Appellants) and not the community at large, no general principals were involved. The price Sandstone might have to pay

[18] The Open Meetings Act MCL 15.263 requires at section (2) that "all discussions of a public body shall be made at a meeting open to the public."

for Plaintiffs/Appellants properties should not constitute a development of any governmental policy as to all the citizens of Novi. Sandstone, a non-governmental agency, was not entitled to any confidentiality or exemption.

The Herald decision best comports with the legislative intent and public policy behind the FOIA. Governmental policy should involve more than a resolution of a specific case or specific properties. Resolution of a deed restriction in specific and limited properties cannot constitute development of a public policy as contemplated by the legislature. Is it now the governmental policy of the City of Novi to attempt to "buy out" deed restrictions in properties that may be utilized for commercial development in the future? One thinks not. There was no evidence presented that the City of Novi had done this in any other instances. Given the clear statutory language regarding the prodisclosure nature of the FOIA, and long standing case law upholding the narrow interpretation of exemptions, the Court of Appeals ruling should be overturned.

Plaintiffs/Appellants were also precluded from investigating this information through the depositions of the relevant persons to explore such questions, and to bring same to the attention of the Court for determination. Mr. Carson stated in chambers that the deal with the City was done when all of a sudden the negative reciprocal easement in the representative deeds were discovered and it was "oh my Gods." **(See Appendix 365a)** The attempt to deal with this situation was not the basis for formulation of any "governmental policy."

MCL 15.231(2) states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them, as public officials and public employees consistent with this act. The people shall be informed so that they may fully participate in the democratic process. (*Emphasis added*).

The use of the phrases "all persons are entitled to full and complete information..." "The people shall be informed so they may fully participate in the democratic process" are prime examples of what "policy" pursuant to the FOIA means. This Court should rule that development of a governmental policy must also be something that lives on beyond the resolution of a specific case. Development of a governmental policy should be defined as general principals applicable to and effecting most, if not, all citizens of a governmental entity, not just a select few.

B. The particularized findings required to deny a FOIA request were not set forth to support exemption.

The Coblentz decision did not address the issue as to what particularized findings the Trial Court must make under MCL 15.243. The findings of the Trial Court in withholding production of the side letters did not meet the requirements set forth in Evening News and Nicita *supra*. The Coblentz decision does not mention or refer to the Evening News and Nicita decisions whatsoever, and made no ruling that the Trial Court complied with the requirements of those decisions!

This Court in Evening News Association v City of Troy, 417 Mich 418, 339 NW2d 421 (1983) set forth the standards and procedures a Trial Court must use in determining whether an exemption to the Freedom of Information Act request is applicable. This Court in Evening News held that the burden of proving the propriety of non-disclosure is on the public body asserting that the requested materials fall within the Freedom of Information Act exemptions. In order to meet this burden, the public body should provide a complete particularized justification for the claimed exemptions. As such, the public body is initially required to provide the complete particularized justification for the exemption.

Pursuant to Evening News, the Trial Court in its review of the justifications provided may

not make conclusory or generic determinations when deciding whether the claimed exemptions are justified. The Court must make specific findings that particular sections of the public record requested by the Plaintiffs/Appellants would, for particular reasons, fall within those exemptions. In determining that the Defendant/Appellee has sustained a claim of exemption, the Court must specifically find that the particular sections of the public record requested by the Plaintiff were denied for particular reasons that fall within the claimed exemption. Use of this language mandates that in order for exemption to be upheld a particularized and specific showing must be made. A mere conclusory reference to the statute, as occurred here, is insufficient.

All public records are subject to full disclosure unless that material is specifically exempt under Section 13 of the Freedom of Information Act. Any exceptions to disclosure must be narrowly construed. *See,* Nicita, p. 751. This Court has held the thrust of the Freedom of Information Act is a policy of full and complete disclosure. See Hagen v Department of Education, 431 Mich 118, 427 NW2d 879 (1988).

The Evening News and Nicita, *supra.* cases set forth the rules the Court must follow in analyzing such a claim for exemption from disclosure:

1. The burden of proof is on the party claiming exemption from the disclosure;
2. Exemptions must be interpreted narrowly;
3. The public body shall separate the exempt and non-exempt material and make the non-exempt material available for examination and copying;
4. Detailed Affidavits describing the matters withheld must be supplied by the agency;
5. Justification for the exemption must be more than "conclusory" i.e mere recitation of the statute; and
6. The mere showing of a direct relationship between records sought and an investigation is inadequate.

In determining whether a particularized justification for exemption exists, the Nicita case set forth a three step procedure the Trial Court should employ in determining whether a particularized

justification exists.

1. The Court should receive a complete particularized justification as set forth in the six rules above; or
2 The Court should conduct a hearing *in camera* based on de novo review to determine whether complete particularized justification pursuant to the six rules exists. *Citing* Vaughn v Rosen, 157 US App DC 345, 484 F2d 820 (1973); or
3. The Court could consider "allowing Plaintiff's counsel to have access to the contested documents under "special agreement" whenever possible."

When the Court chooses to conduct an *in camera* review, the Court still must determine if the government has met its burden of proving the claimed exemptions, and must give particularized findings of the fact indicating why the claimed exemptions are appropriate. Post Newsweek Stations Michigan, Inc. v Detroit, 179 Mich App 331, 445 NW2d 529 (1989)(*emphasis added*).

The Defendant/Appellee cited only MCL 15.243(f) in refusing to produce the two side agreements, and failed to put forth any particularized findings. The only basis set forth by the Defendant/Appellee in denying the Freedom of Information Act request as to the two side agreements was:

> "the request is denied with regard to two documents representing commercial and/or financial information voluntarily submitted to the City of Novi for use in developing governmental policy in connection with the settlement of the Oakland County Circuit Court litigation entitled Sandstone v City of Novi, case number 95-501532-CK as contemplated under MCL 15.243(g)."
>
> MCL 15.243(f) states as follows:
>
> Section 13 (1) a public body may exempt from disclosure a public record under this act any of the following...
>
> (f) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if[19]:

[19] Use of the term if indicates all three subsections must be complied with to maintain exemption. Other sections of 15.243 that have multiple subsections utilize the words "any of the following" "either,""1 or more." See 15.243(b), (j), (s), (t).

(i) the information is submitted upon a promise of confidentiality by the public body.

(ii) the promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(iii) a description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as condition of receiving a governmental contract, license or other benefit. *(Emphasis added)*

Plaintiffs/Appellants had requested production of several side agreements, referred to by Defendant/Appellee as "side letters" created outside the agreement for entry for Consent Judgment. Since Plaintiff never had the opportunity to review these "letters", Plaintiffs/Appellants were at a disadvantage concerning whether these documents were exempt from disclosure. The Trial Court's Order made the conclusory statement that:

> The Court finds that the two letters contain financial or commercial information of Sandstone's voluntarily provided to Defendant by Sandstone in confidence. Further, the letters fall within the policy-making potential contemplated by the Legislature in drafting this exemption to the FOIA. They were intended to facilitate the Settlement Agreement and Consent Judgment and assist Defendant in making the policy decisions with regard to that settlement. The court finds that the content of the letters relates to Defendant's deliberations on the selection of the best governmental policy for the potential expenditure of substantial sums of money and the retention of land for public use. **(See Appendix 6a)**

The Trial Court's Order did not contain any particularized findings for exempting these documents as required under Michigan law. Under the law, it should be incumbent upon Defendant/Appellee and the Trial Court to make a particularized showing of the following information:

1. Did the information in the "letters" constitute commercial or financial information?
2. Did the side "letters" contain commercial or financial information voluntarily provided to any agency for use in developing a governmental policy?
3. What governmental policy were these "letters" used to develop?
4. Was the promise of confidentiality made by the public body upon submission of the side "letters"? If so, who made the promise and when?
5. When was the confidentiality authorized by the chief administrative officer or by an elected official made?
6. Was a description of the information contained in the side "letters" was recorded by the public body?
7. When was the information recorded after it was submitted and was this a reasonable time?
8. Was the information concerning the side "letters" maintained in a central place within the public body?
9. Was the information regarding the side "letters" made available to persons upon request?

Defendant/Appellee's actions in preventing Plaintiffs/Appellants from obtaining discovery and depositions precluded the Trial Court from having this information available to comply with the requirements of Michigan law regarding a denial of a Freedom of Information Act request.[20] The opportunity to examine individuals under oath to answer these questions were critical to the Trial Court and Court of Appeals determinations whether the particularized findings outlined in the statute were made. Neither the Trial Court or the Court of Appeals' Order provided these answers to these questions.

This Court should uphold compliance with the rules set forth in Nicita and Evening News. Defendant/Appellee's response to Plaintiffs/Appellants' FOIA request only cited the exception set forth in the FOIA. The initial burden is on the governmental entity to set forth the basis for the exemption in a particularized manner. Mere recitation of the statute (as Defendant/Appellee did in its response to Plaintiffs/Appellants' FOIA request) is insufficient under the FOIA. The Court of

[20] The depositions of City Manager, Richard Helwig and the Mayor could have provided these answers to the Trial Court.

Appeals failed to correct these errors or require the Trial Court to provide the particularized findings required by Nicita and Evening News. Certainly, the language, intent and public policy of the FOIA was not followed. Applying the law to the present case indicates the side "letters" should be ordered produced.

C. The FOIA requires that the promise of confidentiality must be given upon submission.

The Court of Appeals essentially rewrote or reinterpreted the statutory language "upon a promise of confidentiality by the public body". This Court should make clear the use of the word 'upon' in the language of the FOIA requires the promise of confidentiality must come before or at the same time the "letters" were submitted. The evidence supplied was contradictory in this regard.[21] Yet, other evidence indicated a final determination (whether the side "letters" were to be confidential) was not made until after the FOIA requests by Plaintiff's counsel were made! Mr. Fisher's Affidavit at ¶ 5 submitted in Defendant City of Novi's Memorandum for *In Camera* Document Inspection stated:

> "In response to such FOIA request, in view of what appeared to be the confidential nature of certain of the side letters (referenced in the FOIA request as side agreements), I attempted to work out an agreeable arrangement with the attorneys for Sandstone with regard to the disclosure of such documents." (*Emphasis added*). **(Appendix 487a)**

Ms. Cornelius' Affidavit at ¶7 states, "On or about the same date (November 26, 2002) such determination and agreement was reached with regard to which letters would be deemed

---

[21] Defendant/Appellee submitted an Affidavit by Ronald Hughes dated November 26, 2003 claiming the letters were submitted upon a "clear and advance" promise of confidentiality. The Affidavit does not list the date when the promise of confidentiality was given by City of Novi or in what manner it was decided upon and conveyed. This Affidavit was provided after the Court had stayed discovery which prohibited Plaintiffs/Appellants from deposing Mr. Hughes on his claims and 13 days after the Court's deadline for filing briefs and evidence regarding the issue to which Plaintiffs/Appellants objected. (See relevant docket entries December 1, 2003).

confidential..." *(Date added)* **(Appendix 490a)**

This clearly violates the language of the statute. If the confidentiality of these "letters" was not decided until November 26, 2002, they could not have been submitted upon a promise of confidentiality in June of 2002 as required by the language of the statute. Ms. Cornelius' Affidavit indicated that the confidentiality determination was not made until November 26, 2002, not June 25, 2002 when the Settlement Agreement was entered into. [22]

Apparently, there were seven side "letters." Five (5) were turned over to Plaintiffs/Appellants. **(See Appendix 105a-111a)** Nowhere in any of the produced side "letters" is there any indication that the information was submitted upon a promise of confidentiality by the public body. Mr. Fisher's Affidavit at ¶6 indicated it was Sandstone's position, not the City's, that all "letters" were confidential. **(See Appendix 487a)** None of the produced "letters" on their face indicate that said information was confidential or there was any indication that such confidentiality was promised by the chief administrative officer or any elected official before the "letters" were submitted. Defendant/Appellee merely stated (without affidavit or testimony,) that one of the "letters" contained Sandstone's position that the terms of the letter are confidential under all respects and not subject to disclosure under the FOIA. If this letter was signed off by the Mayor, (as with the 5 "letters" provided) any confidentiality was clearly after, not upon submission. Apparently, one of the withheld "letters" does not even contain any such a provision.

It is important to note, that while Sandstone may have requested the document be kept confidential, the statutory language indicates that the promise of confidentiality must be made by the

---

[22] This is a further reason why the deposition testimony would have been important for the Trial Court's determination on this issue. The March 22, 2004 Evidentiary Hearing the Trial Court appeared to recognize that the FOIA may not have been complied with until after the fact. **(Appendix 462a-463a)**

public body at or before the information is submitted! There was no finding whatsoever to indicate this is what occurred. The fact that the City may have later agreed to confidentiality does not meet the express language of the statute. The primary goal of judicial interpretation of statutes is to give effect to the intent of the legislature. If the language is clear, the statute will be enforced as written. See Federated Publications Inc, *supra*; AMBS v Kalamazoo County Road Commission, 255 Mich App 637, 662 NW2d 424 (2003) and Ryant v Cleveland Twp., 239 Mich App 430; 608 NW2d 101 (2000).

This Court made clear in DeVillers v ACIA, 473 Mich 562, 702 NW2d 539 (2005) that "statutes should be enforced as written" unless unconstitutional. It is not role of the judiciary to enact or write statutes but to enforce them as written. The primary goal of statutory interpretation is to give affect to the intent of the legislature. See In Re: MCI, 460 Mich 396, 596 NW2d 164 (1999). To discern the legislature's intent, this Court must first examine the language of the statute itself. If the statute is unambiguous, it must be enforced as written. See The Title Office, Inc. v Van Buren County Treasurer, 469 Mich 516 (2004).

The FOIA is clear that the promise of confidentiality must be made by the public body before or at the time of submission. The word "upon" is a synonym for "on" which is defined as "at the time of" Black's Law Dictionary 4th Edition (1968). Apparently what occurred in transmittal of the "letters" does not comply with the language of the statute. Neither Novi or the Trial Court provided any particularized findings in this regard.

By use of this specific language, the legislature clearly wanted a certain amount of debate, discussion and a decision as to what matters could be kept confidential and from the public. The determination of confidentiality prior to or at the time of submission the documentation best upholds

the policy underlying the FOIA. Confidentiality should be discussed, debated and passed upon by the public body before confidentiality is promised so there is a clear consideration and determination of the reasons why confidentiality must be maintained. Further, it is important that the producer of the information know that confidentiality has been granted before submitting any documentation. Any other interpretation, of i.e. allowing confidentiality to be determined later would allow abuse of the prodisclosure policy behind the act. This would prevent situations from occurring (as in the present case), where a decision that something should be kept confidential apparently is made after submission in order to protect the financial and negotiating position of a developer.

D. The FOIA requires that in order for documents to be exempt the promise of confidentiality must be authorized at the time the promise was made by a chief administrative officer, or an elected official.

No evidence from the City that the chief administrative officer or a Mayor authorized a promise of confidentiality regarding the side "letters" before or at the time they were submitted was provided. One "letter" apparently does not contain any confidentiality provision. If the "letters" merely contained Sandstone's request or demand for confidentiality, this was insufficient per the clear language of the statute. In fact, Defendant/Appellee provided no Affidavit either from the Mayor, City Manager or City Council authorizing confidentiality prior to the submission of the "letters" to the City. [23] The Affidavit submitted by the Mayor was silent as to this issue. Further, no evidence was ever put forth that the Mayor or City Manager had the power to promise such confidentiality under City of Novi's Charter or by City Council vote. No particularized finding was

---

[23] The depositions of the City Council members would have clarified this fact and tested the veracity of the assertions put forth in Mr. Hughes' late Affidavit. This is why the depositions of these individuals were so crucial to establish the time frame and what confidentiality, if any, was authorized in regard to this issue. Because Plaintiffs/Appellants were denied the opportunity to depose these individuals to provide this information to the Court, there was no way to test Defendant/Appellee's one-sided assertions in their Briefs to the Trial Court.

made by the Trial Court in this regard. The Court of Appeals ruling did not address this error or correct it. This Court should make clear that this requirement must be met before exemption can be maintained or claimed.

E. This Court should rule that at a reasonable time for confidential documents to be recorded and maintained in a central place and be made available to any person on demand pursuant to MCL 15.243(1) is not five months and after an FOIA request.

In this case, compliance with this requirement was not even attempted for almost five (5) months and until after Plaintiffs/Appellants' FOIA request! Only after receiving the Plaintiffs/Appellants' FOIA request, did Defendant/Appellee attempt to comply with the statute. The statutory required documentation was not put on file **until 26 days after Plaintiffs/Appellants' FOIA request** of November 1, 2002 in an 11th hour attempt to comply with the statute. The side agreements are not referred to and do not appear in the final agreement filed with the Court or submitted to the public. The existence of these documents was only discovered by Plaintiffs/Appellants' attorneys upon reviewing the many drafts of the agreement.[24]

In fact, even after suit was filed, Defendant/Appellee did not even know if the statute had been complied with;

Mr. Fisher: "In fact, at the time, I did send something over to the Clerk's office so that it would be available to the public. I called in the last few days and the clerk so far didn't know where she had put those materials, but I'm sure they could be found." **(Appendix 353a)**.

Accordingly, Defendant/Appellee's submitted Affidavits demonstrated the City did not

---

[24] Again, this is why Plaintiffs/Appellants so urgently sought the intentionally deleted exhibits which Defendant/Appellee denied ever existed and requested to depose the relevant persons in that regard which the Trial Court denied. Had Plaintiffs/Appellants' counsel not reviewed the drafts of the agreement and seen the writing in the margins referencing side agreements, they would have never discovered their existence. **(See Appendix 98a)**

comply with the FOIA as the information was not placed in a central location by the public body within a reasonable time after it had been submitted. Five months after the agreement was approved and signed, and only after submission of Plaintiffs/Appellants' FOIA request cannot be the "reasonable time after submission" contemplated by the legislature in enacting the FOIA. This is especially true in this case when the City Attorney was visiting Plaintiff's homes in July, 2002 attempting to get them to waive the deed restrictions on their properties![25] Clearly, the filing was only done by the Defendant/Appellee after Plaintiffs/Appellants' FOIA request. If this was truly development of a governmental policy, why was the required disclosure not made on or about the date of the agreement thereby providing notice to Plaintiffs/Appellants and all citizens of these agreements before Mr. Fisher visited Plaintiffs/Appellants' homes in July, 2002 attempting to get them to waive legal rights. The statute was not followed because the City and Sandstone wanted to obtain advantage over Plaintiffs/Appellants regarding this property without Plaintiffs/Appellants knowing about a behind the scenes "deal" between the City and Sandstone.

Five and a half months, and after a Freedom of Information Act request, cannot be a reasonable time contemplated by the legislature in enacting MCL 15.243(1)(f). Such a ruling does not reflect the intent of the legislature in regard to making this information known to the public. If the governmental entity can wait until after a FOIA request to place notice of exempt material in a public place, the clear public policy set forth in the FOIA is effectively undermined. Clearly, the legislature did not intend this to occur when they utilized the term "reasonable time".[26]

---

[25] The City Clerk and Mr. Fisher's depositions would have been very enlightening as to the reasons behind the 5 month delay.

[26] The Act is silent as to what constitutes a reasonable time. Plaintiffs/Appellants suggest that the 10 day (with extension) response time for a response to FOIA request provided in 15.235(2)(d) would have been reasonable to provide this information. Certainly, what Novi eventually did do could easily have been accomplished within this

Clearly, by setting forth three requirements in the statute, the legislature made clear what was required to maintain confidentiality. Failure to comply with all three requirements results in non-exemption and disclosure. The Court of Appeals decision should be reversed and this Court should order disclosure.

4. This Court should rule MCL 15.234 does not provide for an attorney fee to charged to a FOIA requester.

There exists no provision under the Freedom of Information Act which allows a FOIA respondent to charge the requestor of public records an attorney fee. The Freedom of Information Act states, in relevant portion, as follows:

> *15.234* **Fees; waiver; deposit; computation of costs; application of section**. Sec. 4. (1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefitting the general public. A public record search shall be made and a copy of a public record shall be furnished without charge for the first $20.00 of the fee for each request to an individual who is entitled to information under this act and who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.
>
> (2) A public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds $50.00. The deposit shall not exceed ½ of the total fee.
>
> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall

---

time frame.

> utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.
>
> (4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute. (*Emphasis added*)

After the Evidentiary Hearing on March 22, 2004, the Trial Court ruled that the $150.00 attorney fee was appropriate holding that Mr. Fisher was an employee of the City of Novi. The Court of Appeals upheld this ruling.

Allowing a FOIA responder to charge a requestor an attorney fees significantly impacts the peoples' right the know the workings of their government. If any governmental entity can now charge any requestor an attorney fee for responding to their FOIA request, in certain situations, this could result in the payment of hundreds or thousands of dollars before documentation would be provided. This would serve to severely limit who could obtain information, as it may be cost prohibitive to obtain same and result in constructive denial of many requests. The legislature clearly did not intend this to occur, as they utilized specific language indicating that the costs to be incurred would be by the lowest paid employee capable of retrieving the information necessary to comply with the request and required that the most economical means of copying the material be utilized. Clearly, the legislature did not want to make FOIA requests cost prohibitive to requestors. Use of the word retrieve presupposes that the information is on file and can be obtained and duplicated with

minimal effort and expense. [27]

Had the information concerning the documentation been placed in a centrally located place as required by the statute, there would be no basis to charge $150.00. More importantly, had confidentiality been conclusively determined upon submission as required by the statute and had the disclosure documents regarding the side "letters" been properly filed within a "reasonable time", it would not have taken an attorney to go to "the centrally located place" or to conduct negotiations with any third party to retrieve and provide the documentation to Plaintiffs/Appellants' Counsel. There is no provision under the Freedom of Information Act that calls for such negotiation, and allows a fee for that "service" to be charged to any entity making a FOIA request.

In essence, the Coblentz decision has written into MCL 15.234(1) an attorney fee provision where none existed. The statute itself makes no mention of attorneys fees for responding to a FOIA request. The only mention of attorney fees in the statute was where the legislature included a provision for attorney fees when a FOIA request is wrongfully denied. See MCL 15.240(6). Had the legislature so desired, it could easily have inserted a provision for attorney fees under 15.234(3). The language used by the legislature clearly intended that the information be freely available to those requesting it at a reasonable cost. Under Coblentz, public bodies responding to FOIA request are now able to charge attorney fees to any requestor for examination, review, deletion, negotiation and separation of exempt from nonexempt information. The statute also contemplates that information should be provided at the lowest cost to the general public. The $150.00 attorney fee was not

---

[27] Interestingly, had Defendant/Appellee's complied with the statute in the present case, there would have been no need for any attorney fee in this matter. If the act been complied with, all Ms. Cornelius had to do was go to the central location, pull out the disclosure document and provide it to Plaintiffs/Appellants. In this case, there was nothing on file at the time of Plaintiffs/Appellants' request.

justified under the statute.

The language used by the legislature is very specific. It clearly states that a fee shall not be charged for the cost, examination, review and deletion or separation of exempt and non-exempt information provided under §14 unless failure to charge a fee would result in unreasonably high cost to the public body because of the nature of the particular request. In the present case, $150.00 to the City of Novi, with a significant budget,[28] can not be considered an unreasonably high cost. Further, the public body is required to specifically identify the nature of the unreasonable high cost in order to charge for same as well as establish and publish procedures and guidelines in order to implement same. [29]This was never done.

While the amount of money may not appear to be significant, the legal principal involved is. If municipal or other entities are allowed the charge attorney fees, it may make such requests cost prohibitive, and create a chilling effect on the public's right to know the workings of the government in attempting to determine what their government is doing and to obtain information in that regard. Accordingly, this Court should reverse the Court of Appeals ruling, order return of the $150.00 attorney fee and make clear the statutory language does not provide for such a fee to FOIA requestors.

5. This Court should rule an independent attorney is not an employee of a public body pursuant to MCL 15.234

Under Coblentz, an independent attorney is now an employee of that public body when he is working on a FOIA request. Now, any attorney from an outside law firm who is working on any

---

[28] In its response to Plaintiffs/Appellants' Application for Leave to Appeal, City of Novi asserted its yearly budget for 2002-2003 was approximately 22 million dollars.

[29] No evidence was ever provided that Mr. Fisher's fees were set forth in any published procedure or guideline by Novi.

type of Freedom of Information Act case under MCL 15.234 can now be considered to be an employee of that entity.

The City took the position that their city attorney, Mr. Fisher, was the only person capable of fulfilling this portion of request. Plaintiffs/Appellants were not allowed to conduct any discovery, or take Mr. Fisher's deposition to determine the nature and scope of his representation of the Defendant/Appellee. At the evidentiary hearing the issue was raised as to whether Mr. Fisher was an employee of the Defendant/Appellee. The hearing transcript indicates Mr. Fisher was not an in-house attorney, but an independent contractor retained by the Defendant/Appellee. **(Appendix 406a)** It was determined that Mr. Fisher was not receiving a paycheck from the City or any other benefits from the Defendant/Appellee. Mr. Fisher was not present at the hearing, and did not testify. Plaintiffs/Appellants were precluded from deposing Mr. Fisher by the Court's orders precluding discovery.

The Court of Appeals relied solely on the Blacks' Law Dictionary definition of what constitutes an employee. Holding that an independent attorney is an "employee" under the FOIA will have wide-reaching impact throughout the State of Michigan. Such a determination could result in the expansion of liability against cities, townships, and other entities who employ independent attorneys in responding to Freedom of Information Act requests. As such, under this decision:

- A public body could be sued under the doctrine of Respondeat Superior for any independent error or negligence by that attorney working on a FOIA matter;
- An attorney on his way to Court for a FOIA hearing involved in an accident could have a suit brought against the public body he is performing services for;
- An attorney is injured while working on a MCL 15.234(3) case could seek workman's compensation from the public body he or she is performing services for.
- Expansion of liability could result in increased liability insurance rates and premiums to all governmental entities in Michigan.

In making this determination, a Court should consider the following factors: [30]

1. What liability, if any does the employer incur in the event of the termination of the relationship?
2. Is the work being performed integral part of the employers business which contributes to the accomplishment of common objectives?
3. Is the position or job in such a nature that the employee primarily depends upon the employment for payment of his living expenses?
4. Does the employee furnish his own equipment and materials?
5. Does the individual seeking employment hold himself out to the public as performing tasks of a given nature?
6. Is the work or undertaking in question customarily performed by an individual an independent contractor?
7. Control along with payment of wages, maintenance of discipline the right to engage or discharge employees?
8. Weight should be given to the facts which most favorably effectuates the objectives of the statute?[31]

Applying these factors would have indicated that Mr. Fisher would not be an employee of Novi under the FOIA.[32]

Services by an attorney for a City are commonly referred to as independent contractors in literature concerning Worker's Compensation. See *Michigan Workers Compensation and Michigan*

---

[30] Plaintiffs/Appellants urged the application of the economic reality doctrine now incorporated under MCL 418.101, *et seq* and 418.161. *See* Hoste v Shanty Creek Management, 459 Mich 561, 592 NW2d 360 (1999) to make this determination.

[31] See Williams v Cleveland Cliffs Iron Company, 190 Mich App 624, 476 NW2d 414 (1991), Askew v Macomber, 398 Mich 212, 247 NW2d 288 (1976); Hyslop v Kline, 85 Mich App 149, 270 NW2d 540 (1978) and McKissic v Bodine, 42 Mich App 203, 201 NW2d 333 (1972).

[32] The Defendant/Appellee would not incur any of the liability in the event of the termination of any relationship with Mr. Fisher. It is undisputed that Mr. Fisher works for the Law Firm of Secrest, Wardle, not the Defendant/Appellee. Ms. Cornelius testified he was paid as an "independent contractor." Presumably, he submits billing to Novi and is paid for his services without deduction made for any social security wages or other withholding items. Legal considerations are not the entire or complete basis upon which the City of Novi is governed. Mr. Fisher is the retained attorney for numerous municipalities and cities throughout Michigan, and does not work exclusively for the City of Novi nor primarily depends upon Novi for payment of his living expenses. The Law Firm of Secrest, Wardle, furnishes Mr. Fisher the equipment and material and personnel necessary to respond to perform his tasks. Mr. Fisher holds himself out as an attorney who performs municipal work for a number of municipalities and cities throughout Michigan, not exclusively the City of Novi.

Law and Practice by Edward Walsh, Section 3.4, page 33, 4th edition (2004). The extent of which Novi controlled the performance of Mr. Fisher's job was not determined, nor was any evidence was presented to the Trial Court in this respect. Mr. Fisher certainly used his own legal judgment in responding to Plaintiffs/Appellants' requests as evidenced by the pleadings filed, his statements to the Court and other actions undertaken in defense of this case.

The Coblentz decision establishes new legal liability in the State of Michigan. Upholding this ruling would render all independent attorneys in Michigan responding to or working on FOIA requests employees of the public policy whom they represent. Any attorney who is retained to defend any person or entity under a FOIA request could be considered that entities employee, and could be considered such for the purposes of potential workmans compensation, negligence and legal liability issues. The FOIA does not extend the definition of an "employee" this far. Outside retained counsel should be considered independent contractors and not public body employees under the FOIA.

CONCLUSION

The FOIA is one of the most important pieces of legislation in this state and has great importance for all the citizens of the State of Michigan, particularly those who seek information from their own government. The legislature made certain there would be no need to guess as to the public policy of the FOIA. The legislature put it right into the Act. Michigan Courts have repeatedly reinforced that the FOIA is to be broadly construed to allow people to participate in and know the workings of their government. The FOIA goes to the basic right of the people to know what their own government is doing. In the present case, the Plaintiffs/Appellants had the right to know that a "behind the scenes deal" their government had been cut with a developer regarding their

properties. At the very least, they had the right to know that some type of dealing had occurred. That is why the FOIA is clear and contains certain requirements before documents can be kept out of the public view. The legislature clearly indicated that if something was to be kept secret from the public, certain specific and particularized findings must be made to insure the laws complied with same. The cited Court decisions use of language such as specific and particularized was done to support the public policy of the FOIA and to ensure that non-disclosure is a difficult thing to achieve and should be allowed only in limited situations. The public policy set forth by the legislature and decisions by this Court should be enforced as written to give effect to the intent of the legislature in enacting the FOIA.

RELIEF SOUGHT

Plaintiffs/Appellants request that the Court of Appeals decision be overruled, that this Court order the documents requested in Plaintiffs/Appellants' FOIA requests be produced immediately, as well as award costs and attorney fees as required under the FOIA to Plaintiffs/Appellants.

LAW OFFICES OF BAILEY & ROSSI, P.C.

By: _____

RICHARD D. WILSON (P39344)
GARY A. ROSSI (P25392)
Attorneys for Plaintiffs/Appellants
42505 Woodward Ave., Ste. 200
Bloomfield Hills, MI 48304
(248) 858-2443

Dated: December 12, 2005